Reasons and Abilities: Some Preliminaries (2013)

by John Gardner
Professor of Jurisprudence
University of Oxford
http://users.ox.ac.uk/~lawf0081

American Journal of Jurisprudence 58 (2013), 63
doi: 10.1093/ajj/aut004

Corrective Justice, Corrected

JOHN GARDNER*

1. Coleman's change of heart

Jules Coleman once espoused what he called the 'annulment' conception of corrective justice.[1] According to this conception, corrective justice is done to the extent that wrongful losses and wrongful gains are annulled, neutralised, undone, reversed. It matters not, from the point of view of corrective justice, how the annulling is achieved. Possibly each wrongful gainer repays (or bears the expense of repaying) each wrongful loser at whose expense she wrongfully gained. Possibly, for the purpose of annulment, each wrongful loser is randomly assigned to a single wrongful gainer whose gain is of the right order to cover the loser's loss. Possibly all wrongful gainers pay their gains into a pool from which all wrongful losers are repaid, without assignment of particular gainers to particular losers. Possibly more elaborate mechanisms than these can also be devised. Different

* Professor of Jurisprudence, University of Oxford. Writing this critical comment has taken me back to the happy hours I spent sparring with Jules Coleman in the classes we co-taught at Yale Law School in 2002 and 2005, and also to many long discussions we have enjoyed while walking the byways of Connecticut, or lunching in Milford or Branford, or driving down Merritt Parkway into New York City. As will be apparent, my way of thinking about the questions traversed here owes far more to Jules than to anyone else, even where (perhaps especially where) we do not agree in the slightest.

[1] See notably his 'Tort law and the demands of corrective justice', *Indiana Law Journal* 67 (1992), 349 – based on a 1988 lecture – in which Coleman mounts his final defence of the annulment conception before his change of heart.

mechanisms for doing corrective justice, so understood, will clearly have their different costs and benefits, varying from time to time and place to place. So it can be reasonable to favour one over another in the development of law and public policy. None of these costs and benefits is a cost or benefit from the point of view of corrective justice, however, except to the extent that it affects the incidence of the relevant kind of annulment. As Coleman puts it, corrective justice conceived like this 'does not specify a particular mode of rectification.'[2]

In July 1990, while working on what was to become *Risks and Wrongs*, Coleman was persuaded that the annulment conception of corrective justice was wrong. Presenting a draft defence of the annulment conception to a group of moral and legal philosophers meeting at St Giles House, Oxford, he was moved by objections that were raised (principally) by Stephen Perry and Joseph Raz. These objections led him to entertain a rival conception of corrective justice, which he came to call the 'relational' conception, according to which

> it is the wrong, not the loss, that must be annulled. It claims, in effect, that corrective justice operates on the relationship between persons in the following way. If one person has wronged another, then corrective justice imposes a duty on the wrongdoer to rectify his wrong.[3]

Coleman did not end up embracing the relational conception. Rather he saw elements of truth in it, and adapted his thinking to accommodate them. He insisted that the annulment conception was right to focus on the annulment of the wrongful loss rather than of the wrong itself, but agreed that its way of doing so was open to some objections to which the relational conception was impervious. His revised analysis of corrective justice, combining some elements of the annulment conception with some elements

[2] Coleman, *Risks and Wrongs* (Cambridge 1992), 306. Hereafter *R&W*.
[3] *R&W*, 314.

of the relational conception, he called the 'mixed' conception. He endorsed it in chapter 16 of *Risks and Wrongs*. He has continued to stand up for this mixed conception in later work, including in his 2001 book *The Practice of Principle*.[4]

I do not doubt that Coleman was right to retreat from some aspects of the annulment conception. My concern here will mainly be with his reasons for doing so, as they are spelled out in *Risks and Wrongs*. I tend to think that the reasons given by Coleman were not valid reasons for the retreat, or, if valid, were not sufficient. Possibly Coleman was given valid and sufficient reasons by Perry and Raz.[5] If so, those reasons did not make it into his book. These are the two reasons that did make it in:

> The annulment view has two general problems that are related. First, it seems unable to account for the distinction between distributive and corrective justice. Second, it provides only grounds for recovery, whereas a proper conception of corrective justice will specify a mode of rectification as well as a reason for doing so. Rectification in corrective justice will be the duty of someone in particular.[6]

The second reason is opaquely expressed and my doubts about it only come into focus once we see how Coleman clarifies it and the mistaken directions in which it sends him. That will be the topic of section 3. Section 2, meanwhile, will comment on the

[4] Oxford 2001. I have not taken account of Coleman's later formulations and explanations of the mixed conception in writing this paper. Some may mark significant changes in his thinking, but we are gathered here to reflect on *Risks and Wrongs*, and I have therefore treated his views as if frozen in 1992.

[5] I was there at the 1990 event, but exactly what was said escapes me. Perry presented prepared comments, a later version of which appeared as 'Comment on Coleman: Corrective Justice', *Indiana Law Journal* 67 (1992), 381. To judge by this version Perry did give valid and sufficient reasons for retreat from the annulment conception. However they do not strike me as matching the reasons that Coleman gives for his retreat in *R&W*, even though Coleman says that he owes those reasons to *inter alia* Perry (*R&W*, 312).

[6] *R&W*, 311.

supposed importance of maintaining the distinction between distributive and corrective justice, Coleman's first advertised reason for retreating from the annulment conception. In section 4 I sketch some of my own doubts about the annulment conception and contrast these with Coleman's.

2. Distribution and correction

Aristotle conveys the distinction between distributive and corrective justice using mathematical images. Distributive justice, he says, is the justice of 'geometrical' proportion, the justice of multiplication and division.[7] Corrective justice, by contrast, is the justice of 'arithmetical' proportion, the justice of addition and subtraction.[8] This mathematical imagery creates an impression of stability and exactitude. Applying it to the annulment conception shows how deceptive that impression is. The annulments sought by the annulment conception can be presented arithmetically, as the subtraction (from the gainer's assets) of wrongful gains and the addition (to the loser's assets) of wrongful losses. But they can equally be presented geometrically, as a division of the spoils of wrongdoing, with a ratio of 1:0 between the shares that go to wrongful losers and the shares that go to wrongful gainers respectively. Notice that both of these ways of explaining what is being achieved are indifferent regarding the mechanism by it is achieved. Both the arithmetical and the geometrical operations can be undertaken either by assigning the task of repaying individual losers to the individual gainers who wronged them (or indeed by other ways of matching individual gainers to individual losers), or by aggregating the wrongful gains of all gainers to defray, *en masse*, the wrongful losses of all losers.

[7] *NE* 1131^{b}14.
[8] *NE* 1132^{a}2.

Coleman seems to think that what we have here is a problem with the annulment conception. But the problem is not specific to the annulment conception. It is a problem with the whole Aristotelian apparatus of classification. It arises because justice is none other than the distinctive moral virtue of the allocator, the person who concerns herself with who is to get how much of what and why.[9] Since all justice is allocative, and 'distributive' and 'allocative' are synonyms, it is hard to resist the thought that all justice is distributive. As Leslie Green says, '[i]f we could free ourselves from the familiar Aristotelian categories, we should say that justice is always a matter of distribution.'[10] Nor is this a mere terminological problem. After many failed efforts to show what is special or distinctive about distributive justice, such that it leaves space for other forms of justice to exist apart from it, the best conclusion to draw is that there is nothing special or distinctive about distributive justice except that it is the 'nothing special or distinctive' form of justice. It is the plain, default, vanilla form. It is justice *tout court*, justice *sans phrase*, justice full stop. Other forms of justice may certainly exist but they are the ones that need to be shown to be special, worthy of a separate billing. It is not that they have another identity because they are not distributive; it is that they are not distributive because they have another identity. When Aristotle points to 'corrective justice' as another form of justice, it is not because norms of corrective justice do not meet his specification for being norms of distributive justice. Sure they do. All norms of justice do. It is because, in his view, they also meet another specification which makes them worthwhile subjects of separate reflection

[9] I have elaborated and defended this view of the subject-matter of justice in various places, beginning with 'The Virtue of Justice and the Character of Law', *Current Legal Problems* 53 (2000), 1, a significantly revised version of which is forthcoming in my *Law as a Leap of Faith* (Oxford 2012).

[10] Green, 'The Germ of Justice', draft at http://bit.ly/green_germofjustice (accessed 18 April 2012).

Is Aristotle right to separate them out for separate reflection? It is notoriously hard to pin down what is interestingly distinctive about them. Consider the mundane case of *Two Children and a Cake*, and some possible norms of justice that might be applied to it. I should emphasise that it does not matter at all whether these norms of justice are sound (defensible, attractive, correct). What interests us here is only the *form* of justice that someone who uses these norms is administering. Distributive or corrective?

1. An even share – half the cake – to each of the two children.

2. A choice between the two (possibly uneven) shares to whichever child didn't call the other one an idiot today (or who didn't hide or take the other one's belongings etc.)

3. A choice between the two (uneven) shares to whichever child didn't make a preemptive attempt to grab one of them.

4. A choice between the two (uneven) shares to whichever child didn't preemptively grab and gobble up his or her preferred share of yesterday's cake.

5. A choice between the two (uneven) shares to whichever child didn't get a choice of shares of yesterday's cake (say, because he or she was visiting grandparents, or at camp, when the cake was served).

6. A choice between the two (uneven) shares to whichever child won't get a choice of shares of tomorrow's cake (say, because he or she will be visiting grandparents, or at camp, when the cake will be served).

We start here with what is surely, in Aristotelian terms, a problem of distributive justice. But should all the listed norms for tackling it be classified, in Aristotelian terms, as norms of distributive justice? That is not so obvious. It is particularly tempting to classify norm 4 as a norm of corrective justice. It takes a subtractive approach to division, an 'arithmetical' approach to a 'geometrical' problem. It subtracts the privilege of

choice today from the child who seized that same privilege from the other yesterday, and gives that privilege today to the child who had it seized from him yesterday; it cancels out an improper gain with an otherwise like loss, and an improper loss with an otherwise like gain. True, it does so in such a way that the two days' worth of cakes (in aggregate) will end up having been divided as if according to norm 1, which is surely a norm of distributive justice if any is. But that seems irrelevant to the question that concerns us here. It is an interesting question (to which we will return at the end) whether what falls to be corrected by doing corrective justice is always a distributive injustice, such that sound norms of corrective justice never conflict with sound norms of distributive justice. That strikes me as very unlikely to be true, but it is not our immediate problem. Our immediate problem is the prior one of whether there is a distinction worth drawing between the two forms of justice, so as to give philosophical life to questions like the one we just asked about the potential for sound norms of corrective justice to conflict with sound norms of distributive justice.

In attempting to forge such a distinction, the first challenge is to explain why norms 3 and 5 on the list above are not norms of corrective justice if norm 4 is. If our attention in norm 4 is drawn to the fact that one of the children suffered a loss yesterday, then why not group it with norm 5, in which the same fact holds? If our attention in 4 is drawn to the fact that one of the children has been wronged by the grabbing sibling, then why not group it with norm 3 in which the same fact holds? No doubt the wish to avoid both of these groupings explains Coleman's emphasis in the annulment conception, preserved in the mixed conception, on the compound feature of 'wrongful loss'. There must be *both* a wrong *and* a loss for justice to be corrective. But when we see all these possible norms for handling *Two Children and a Cake* enumerated side-by-side, we may wonder why Coleman was so keen to isolate norm 4 in this way from those around it. What motivates him (or us) to give a special status to norm 4, to

designate it as a norm of 'corrective justice', and thereby to degroup it from both norm 3 and norm 5? And wondering about the motivation for such a degrouping may lead our doubts to extend further. Once we are tempted to assimilate norm 3 to norm 4, why not norm 2 as well, identical to norm 3 apart from the fact that the wrong committed by one child against the other was not now one of cake snatching, but one of (say) name calling? And once we begin to wonder about whether norm 4 should perhaps be classified with norm 5, we may also begin to wonder why the same classification should not equally extend to norm 6. Why degroup the case where the past loss is what is rectified, norm 5, from the otherwise identical norm 6 in which it is an otherwise identical future loss that is rectified?

Reflection on the supposed differences between past and future losses (and gains) can be particularly destabilising for those intent on maintaining the distinction between distributive and corrective justice. In a case that we could call *Blind or be Blinded* my enemy has already launched a wrongful attack on me from which only one of us can possibly emerge with functioning eyes. (Exactly as he planned, say, we are now suspended above a chemical tank in such a way that, if one of us goes up to safety, the other goes down into the tank.) Thanks to his attack there is now, as it were, a scarcity of future eyesight as between us, giving rise to a local problem of distributive justice. There are two people competing for one indivisible future capacity to see. According to a possible (and widely endorsed) norm of distributive justice, it is my enemy who, all else being equal, should bear the loss of eyesight, because he is the wrongful attacker.[11] To that end I enjoy moral latitude to defend my own eyesight against my enemy's attack by transferring the loss of eyesight to him. Thanks to that moral latitude, my doing so does

[11] See e.g. Jeff McMahan, 'Self-defense and the Problem of the Innocent Attacker' *Ethics* 104 (1994), 252.

not turn me, in turn, into a wrongdoer against him, and so does not give him moral latitude to blind me to save his own sight. The losses he would inflict on me are wrongful losses; those that I would inflict on him are non-wrongful losses. Distributive justice, many think, favours the infliction of losses on wrongdoers over losses on non-wrongdoers when scarcity makes it the case that losses must be inflicted on somebody.

Now suppose that, in spite of my efforts to defend myself, my enemy still manages to blind me and thereby to save his own sight. Surely the norm of distributive justice that already gave me the moral latitude to defend myself – the one according to which it is my enemy, all else being equal, who should lose his sight – still regulates the aftermath. The norm says that, as the wrongful attacker, he is the one to bear the loss of sight, all else being equal. If that cannot literally be done (either because it is now impossible or because it is morally impermissible on some other ground) then surely he must at least now bear the *cost* of lost sight, the bills for treatment and care and assistance and so forth, and the sacrifices in quality of life, which should surely (according to the original norm of distributive justice) have been his own costs to begin with. That move in a reparative direction might be thought to take us into the realm of corrective justice if anything does. Yet apparently we are re-applying the same norm of distributive justice that we started with. How are we going to explain the fact that when the losses and gains were still in the future we happily regarded the norm as a norm of distributive justice, but that applying it retrospectively we now think of it as typifying a different form of justice, viz. a corrective form? Why isn't this still simply a local problem of distributive justice, indeed the same local problem of distributive justice that arose at the very moment my enemy started his attack on me?[12]

[12] For one answer, see Stephen Perry, 'The Moral Foundations of Tort Law', *Iowa Law Review* 77 1992), 449. The gist: once the blinding is done and we are dealing with the aftermath, 'the *localized* nature of the distributive scheme

The challenge, I hasten to add, is not that of finding possible distinctions to draw between corrective and distributive justice. Of those there are plenty. The challenge is only that of finding a distinction that is worth drawing between corrective and distributive justice, or (to put it another way) of motivating the drawing of a distinction in one place rather than another. Some, understandably, have given up on this task in the light of the classificatory difficulties thrown up by cases like *Two Children and a Cake* and *Blind or be Blinded*.[13] Personally I am not among them. I am one of those who finds the distinction between distributive and corrective justice worth drawing, and for whom *Blind or be Blinded* actually provides a good illustration of how.[14] So I clearly do not object to Coleman's view, both before and after *Risks and Wrongs*, that the distinction between distributive and corrective justice should be maintained. All that worries me is his relying on the importance of maintaining that distinction as a reason to abandon the annulment conception in favour of the mixed conception. I do not see how, in view of what we have just learnt, it can possibly serve as such a reason.

Let me explain. When Coleman says that the annulment conception of corrective justice 'seems unable to account for the distinction between distributive and corrective justice' we could read him in any one of the following three ways.

(a) We could read him as claiming that the annulment conception does not draw *any* distinction between corrective and distributive justice. That much we know to be false. The

[becomes] arbitrary and unjustified; there is [now] no basis for limiting the group of potential loss-bearers to the injurer and the victim alone' (471).

[13] See e.g. John Finnis, *Aquinas: Moral, Political, and Legal Theory* (1998), 215; Wojciech Sadurski, 'Commutative, Distributive and Procedural Justice – What Does it Mean, What Does it Matter?', draft at http://ssrn.com/abstract=1471022 (accessed 18 April 2012)

[14] For further elaboration see my 'What is Tort Law For? Part 1: The Place of Corrective Justice', *Law and Philosophy* 30 (2011), 1.

annulment conception clearly identifies norm 4 in *Two Children and a Cake* as a norm of corrective justice while leaving norms 1 to 3 and 5 to 6 as (vanilla) norms of distributive justice. We may not be comfortable with drawing the distinction at that point or in that way, but a distinction is most assuredly is.

(b) Alternatively, we could read Coleman as claiming that the annulment conception does not draw *the right* distinction between corrective and distributive justice. But if that is what he means, he is simply announcing the conclusion he is going to reach, viz. that the annulment conception is wrong and the mixed conception is right. That one is going to arrive at a certain verdict is not a possible reason for arriving at it.

(c) Finally, and most plausibly, we could read Coleman as claiming that the annulment conception, unlike the mixed conception, does not draw a distinction *worth drawing* between corrective and distributive justice. The problem that faces him on this interpretation is that, until he explains what would make a distinction between corrective and distributive justice worth drawing, we can't tell whether the annulment conception truly falls at this hurdle. It is not enough to object to the annulment conception that what qualify as norms of corrective justice according to it *also* meet the specifications for being norms of distributive justice. As we saw, that much is going to be true under any conception of corrective justice. The task is to explain why, *in spite of this possibility of assimilation*, we should still want to classify some norms as norms of corrective rather than distributive justice. What use are we going to make of the distinction? How is it going to help us? Until Coleman explains what is at stake in drawing or declining to draw the distinction – or in other words what we would be *looking for* in a worthwhile distinction between corrective and distributive justice - he has done nothing to show how the annulment conception lands us with a less worthwhile distinction than any other. So, at this point, he has given us no reason to abandon it.

2. The supposed agent-relativity of corrective justice

It is only when he expands on his second advertised reason for abandoning the annulment conception that Coleman begins to reveal what might be at stake in drawing the distinction between distributive and corrective justice, and hence what might motivate us to draw the distinction in one place rather than another. Most prominently he emphasises what he calls the 'agent-relative' aspect of corrective justice. Justice in its corrective form, he says, gives 'individual agent-relative reasons for acting' of a kind not found in justice's more vanilla manifestations.[15] 'If Josephine steals Ronald's radio,' he says,

> ... [i]t is not as if each of us has a responsibility, if any of us does, to see to it that Ronald's radio is returned or, if it is damaged, that he is compensated. Rather Josephine has a reason for returning the radio that none of [the rest of] us has. The same *might* not be true with respect to *at least some of* our other important duties to Ronald in distributive justice. If distributive justice required that certain of Ronald' needs be met, then each of us *might* have the same kind of reason in justice to see to it that those needs were met.[16]

You will notice, in the words that I have italicised here, that Coleman is already wary about the decisiveness of the distinction he is drawing. While all reasons of corrective justice are 'agent-relative', he is not yet sure whether all 'agent-relative' reasons of justice are, by the same token, reasons of corrective justice. If he is left with some other 'agent-relative' reasons that are still reasons of justice he will obviously need to come up with some further criterion for isolating the corrective ones. I will come back to that problem towards the end of this section. But first let me air some worries about the idea of 'agent-relativity' that

[15] *R&W*, 311.
[16] *R&W*, 311.

Coleman has in mind. In what sense, we may wonder, does Josephine have a reason that none of the rest of us have?

Talk of 'agent-relative reasons' among moral philosophers does not always keep the following two ideas as separate as it should. One is the idea that a certain reason to φ is a reason only for a certain agent to φ. I promised to come to your house for dinner, for example and the reason is conformed to if and only if I am the one who shows up. The reason is then, as I have put it elsewhere, 'personal in respect of conformity'.[17] The other idea sometimes branded as the idea of agent-relativity is this: that a certain reason to φ is such that each of us should care more about our own φing than we should about other people's φings. I have a choice, for example, between killing someone and allowing you to kill that same someone. Any given reason not to kill is (as I have put it) 'personal in respect of attention' if and only if I should choose your doing the killing over my doing the killing, even when all else is equal as between us.[18] Notice that these two ways in which reasons might be personal can come apart quite radically. Even though my promise is a reason to come to your house for dinner that only I can conform to, it does not follow that that my conforming to it should be of more concern to me than it should be to my boss, to my friends, to my taxi-driver, or indeed to you. Perhaps getting me there requires a complex operation in which many must participate. Then we have a reason that is personal in respect of conformity but not personal in respect of attention. Meanwhile, even though there are many

[17] See my 'Causation and Complicity' in Gardner, *Offences and Defences* (Oxford 2007), 57 at 62.

[18] What counts as keeping all else equal? Indeterminacy on this point leads some to conclude, as I conclude, that any impression of reasons being personal in respect of attention is superficial, and that deep down all reasons are impersonal in respect of attention. There is always something else, not being kept equal, that explains the personal attention called for by the reasons. See my discussion in ibid, 64-5.

reasons for not killing that are open to conformity by anybody and everybody, it does not follow that we should be indifferent, even so far as those reasons are concerned, about who ends up actually doing the killing. We might well want to draw straws in the hope that the dirty work will end up being done by somebody else. Then we have reasons that are not personal in respect of conformity but are personal in respect of attention; each of us should care more about the reason *as it applies to us*.[19]

Which way of being personal does Coleman ascribe to reasons of corrective justice when he calls them agent-relative? His remarks send out mixed signals.[20] But it is far from clear, given what he wants to do with reasons of corrective justice once he has isolated them, that he can afford to characterise them as agent-relative in *either* sense. Coleman plans to show, in due course, that 'tort law ... implement[s] corrective justice'.[21] Tort law, however, clearly does not regard the reasons for wrongdoers (tortfeasors) to repair wrongful losses as either personal in respect of attention or personal in respect of conformity.

Why not personal in respect of attention? Because tort law is structured around the idea that whatever legally salient reasons a wrongdoer has to annul his wrongful losses are also reasons for the law, through its various officials and professionals and other agents, to get heavily involved in seeing to it that those very same reasons are conformed to. It is true that tort law's officials (unlike those of the criminal law) only get involved when the plaintiff, the person who was wronged, exercises her legal power to trigger their involvement by commencing court proceedings.

[19] This is one way to understand what Bernard Williams is trying to convey with his famous 'Jim in the Jungle' example in J.J.C Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge 1972), 98-9.

[20] For a gesture towards the 'personal in respect of attention' reading, see *R&W*, top of 315. In the middle of 319, by contrast, there is a gesture towards the 'personal in respect of conformity' reading.

[21] *R&W*, 262 and 374.

But that just adds one more person (the plaintiff) to the long list of people who, according to the law of torts, are supposed to care at least as much about the wrongdoer's reasons to correct wrongful losses as the wrongdoer himself is supposed to care about them. I say 'at least' because the various participants in the legal proceedings are often called upon to pay even more scrupulous and sustained attention to the reasons for correction of the wrongful loss than any reasonable wrongdoer would himself have given them. They are expected to go to what might well, outside of legal proceedings, be regarded as disproportionately expensive and laborious lengths to make sure that wrongful losses are corrected. How can we possibly square that with the idea that the legally salient reasons to correct wrongful losses are somehow personal, in respect of attention, to the wrongdoer himself?

Now for the idea that those reasons are personal in respect of conformity. Again the law of torts doesn't seem to see them that way. The law is indifferent as between correction of losses by the wrongdoer and correction of losses on the wrongdoer's behalf by an insurer, a friend, or an anonymous benefactor. It cares not who pays the reparative damages so long as they are paid. If nobody ultimately pays them the law may simply authorise them to be taken from the wrongdoer, by seizure of assets or attachment of earnings. If the legally salient reasons for the wrongdoer to correct wrongful losses were personal in respect of conformity, none of this would make any sense. It would be as if I could keep my promise to come to your house for dinner by passing the dinner invitation on to somebody else, who then somehow shows up at your dinner party on my behalf.

These doubts about the agent-relativity of reasons of corrective justice are compatible with Coleman's vaguer pronouncement that '[r]ectification in corrective justice will be

the duty of someone in particular.'[22] They only go to show that not all duties of someone in particular are agent-relative ones. At least some duties of someone in particular are impersonal in respect of attention, i.e. their performance is everyone's business, and not only or not especially the business of the people whose duties they are. And at least some duties of someone in particular are impersonal in respect of conformity, i.e. they can be performed by others acting on behalf of those whose duties they are. Duties of corrective justice must be impersonal in both ways, it seems to me, if they are to have the primacy that Coleman wants them to have in explaining the law of torts. It is open to Coleman to say, of course, that all he ever meant was what he said first, viz. that duties of corrective justice have to be somebody's in particular. In spite of his talk of 'agent-relativity' and associated apparatus, he might say, he never meant to say that duties of corrective justice also need to be personal in respect of attention or personal in respect of conformity. But Coleman has a lot to lose by backing out of his reliance on agent-relativity. It means that his attempt to distinguish corrective justice from (vanilla) distributive justice fails. For all duties, including all duties of justice, are somebody's in particular. There is no such thing as a duty without a particular person who has it.

Just think back to the various norms we considered in connection with *Two Children and a Cake*. Each of these norms could well be used by a parent who is presiding over the sharing out of the cake. Whichever norm the parent uses (of norms 2 to 6) she may plausibly say that all she is doing in using the norm is enforcing a duty of justice that one of the children anyway has to concede a choice of slices to the other child. She is upholding a duty that belongs to the first child in particular, and thereby enforcing the right of the second child. So far, so tort law. Would Coleman be prepared to conclude, then, that all of these

[22] *R&W*, 311.

norms 2 to 6 are norms of corrective justice in his sense? Surely not. It does not follow, of course, that Coleman has no way of distinguishing duties of corrective justice from duties of distributive justice. It only follows that his second reason for abandoning the annulment conception took him down a blind alley in his attempts to draw that distinction. When all thoughts of agent-relativity are stripped out, the bare idea that duties of corrective justice are 'dut[ies] of someone in particular' was not a reason for abandoning the annulment conception, for it did not point to anything special about duties of corrective justice.

It might be objected that Coleman anticipated and neatly sidestepped this critique when he wrote so coyly that what is true of our duties of corrective justice '*might* not be true with respect to *at least some of* our other important duties ... in distributive justice.'[23] Didn't he thereby anticipate that there might also be duties of distributive justice such as those we listed in connection with *Two Children and a Cake* which *are* relevantly similar to duties of corrective justice, and which remain to be distinguished from duties of corrective justice in some other way?

Indeed he did. The problem is, however, that everything Coleman says about distributive justice makes *Two Children and a Cake* seem like the basic model for all cases of distributive justice, subject only to differences of scale and complexity. Consider what he says about distributive justice in wider society:

> [W]e all have reasons ... for providing each member of the community with whatever it is that the principle of distributive justice requires of us. This responsibility falls to each and every one of us, but co-ordination in effectively discharging this duty is difficult. Therefore we create larger institution, the state, that acts as our agent and sees to it that we discharge our obligations under distributive justice.[24]

[23] *R&W*, 311.
[24] *R&W*, 312.

The suggestion here is not that we each lack duties to support the needy (or whoever else has rights in distributive justice) until the co-ordinative agency of the state imposes them. On the contrary, for Coleman, the state comes in to co-ordinate, and thereby we hope to optimise, our performance of *already existing* duties. Each of these duties (like every duty) is the duty of someone in particular. Moreover, the content of these duties varies from person to person; not everyone owes the same under the heading of social distributive justice; what each owes may even depend on what each has done lately (in the way of selling assets, living abroad, earning income, donating to charities, wasting resources, etc.). In any event, I have my contributory duties and you have yours. They are neither more nor less agent-relative than the duties I owe in corrective justice. What is the relevant difference, then, between the state acting as our agent in meeting the claims of those to whom we are duty bound in distributive justice and the court acting as our agent in in meeting the claims of those to whom we are duty bound in corrective justice? I can think of a couple of significant differences. But not one of them is helpfully conveyed by saying that 'rectification in corrective justice will be the duty of someone in particular'. Still less does any of them have anything to do with agent-relativity.

3. Some modest proposals

Coleman overcomplicates his retreat from the annulment conception of corrective justice. That conception can be repaired and rescued more simply by narrowing it in one respect and broadening it in another. I will begin with the narrowing.

(a) *Narrowing the annulment conception*. The annulment conception correctly associates corrective justice with the annulling, neutralising, undoing, or reversing of something. It errs only in presenting losses and gains as the things to be annulled, neutralised, undone, or reversed. The thing to be annulled in

corrective justice is always a *transaction*, be it intentional or accidental. That is the Aristotelian view.[25] As I have expressed the same view before, corrective justice is the specialised allocative business of allocating things *back*, meaning back from the person to whom they came (call him R for 'recipient') to the person from whom they came (call her S for 'sender').[26] If what R received from S was a loss or gain then one aspect of annulling the transaction is annulling the loss or gain in question, by allocating it back to S. But the annulling of losses and gains is not otherwise a desideratum of corrective justice. Inasmuch as the losses or gains in question cannot be undone in that way, by allocating them back whence they came, they cannot be undone under the heading of corrective justice. That is the real basis of the thought that 'corrective justice will specify a mode of rectification as well as a reason for doing so.'[27]

This is the feature of corrective justice that makes it seem somehow – vaguely - more personal than (vanilla) distributive justice. It is probably what Coleman was trying to preserve with his misguided excursion into agent-relativity. If S inflicted some loss on R, then undoing the transaction is not merely a matter of undoing R's loss. It is a matter of undoing R's loss *at S's expense*. If R made some gain from S, then undoing the transaction is not merely a matter of undoing R's gain. It is a matter of undoing R's gain *by passing it to S*. That is the respect in which Coleman's annulment conception benefits from being narrowed down. Its original focus on gains and losses has to be replaced with a more limited focus on transactional gains and losses, and more precisely a focus on shifting them back whence they came.

Aristotle noticed an important feature of corrective justice so understood, which Coleman nicely preserved in his original annulment conception and which is well worth preserving. Most

[25] *NE* $1130^{b}34$-$1131^{a}9$.
[26] See my 'What is Tort Law For? Part 1', above note 14.
[27] *R&W*, 311.

transactions cannot literally be reversed. If you blind me or break my leg there may be some repairs that can be done and some consequences that can be averted but we cannot literally press rewind and deblind me or unbreak my leg. Some money and property transactions may seem to be literally reversible but even here there are usually intervening changes of value or position which make any reversal imperfect. One way to express this is to say that few transactions are zero-sum by the time of reversal: what is gained is very rarely the equivalent of what is lost. Even in *Blind or be Blinded*, where we might be tempted to say that my enemy gained what I lost (sight), this is a misleading portrayal of the transaction. Thanks to my enemy's attack there was less sight to go round. He did not come to steal my sight for his own additional use, e.g. to give him eyes in the back of his head by some sci-fi procedure, but merely to deprive me of my sight. At the end he did not have any more sight than he originally had. So there was no literal gain corresponding to my loss. Nor (unless there is more to the story than I let on) did my enemy gain any new benefits corresponding to my new burdens of sightlessness. My life gets less remunerative and more expensive; but his, so far as we know, gets no more affluent or economical. Gains and losses, in short, come quite radically apart.

Aristotle explains: when we set about reversing a transaction under the heading of corrective justice we *treat* S as having gained what R lost 'even if [gain] be not a term appropriate to certain cases, for example to the person who inflicts a wound'[28] (because the transaction was entirely destructive). Likewise, in administering corrective justice, we *treat* S as having lost what R gained even when there was no literally corresponding loss (because it was the transaction that created the opportunity for profit). Coleman correctly captured all this in the annulment conception. He correctly captured that gains and losses may

[28] *NE* 1132^{a}10-12.

come apart and that, rather than leaving no logical space for corrective justice to be done, this leaves two distinct logical spaces for corrective justice to be done. We could undo the losses; we could undo the gains. All that Coleman missed was that 'undoing' them in the relevant sense meant allocating them back from S to R; otherwise he was on exactly the right track. Alas, in his move to the mixed conception in *Risks and Wrongs*, Coleman surrendered this advantage. He wrongly hived off what he called 'restitutionary justice' from corrective justice[29] on the ground that the symmetry of the annulment conception, its logical space for the undoing of gains as well as losses, was part of what made it 'unable to account for the distinction between distributive and corrective justice.'[30] Not so. What made the annulment conception 'unable to account for the distinction between distributive and corrective justice' was only that it focused on the reversal of gains and losses as such, rather than on the reversal of transactions by which gains or losses were made.

I should emphasise that I am not expressing the view that we should be indifferent, morally speaking, as between norms of corrective justice that require the repair of losses irrespective of gain and those that require the disgorgement of gains irrespective of loss. It is a lot more difficult, I think, to defend a requirement to disgorge lossless gains than a requirement to repair gainless losses. But that is another debate.[31] The debate here is only about which *form* of justice is being done by somebody who applies these requirements, assuming that the requirements are sound

[29] *R&W*, 371.
[30] *R&W*, 311.
[31] My 'What is Tort Law For? Part 1', above note 14, makes a start at defending the wrongdoer's duty of corrective justice to repair losses arising from wrongdoing. The defence I offer there patently wouldn't suffice, as it stands, to defend duties to disgorge the gains of wrongdoing. I hint at how it might be extended to do so in certain cases in 'Torts and Other Wrongs', *Florida State University Law Review* 39 (2011), 000.

(defensible, attractive, correct). My suggestion is that the justice is corrective if and only if the disgorgement or repair (as the case may be) forms part of an allocation back from R to S, or what I also called the undoing of a transaction between them.

(b) Broadening the annulment conception. Coleman's annulment conception associated corrective justice with the undoing only of *wrongful* (i.e. wrongfully created) losses and gains. This was originally, I suspect, his way of recognising what he vaguely perceived to be the transactional focus of corrective justice. Wronging someone is, in the sense that concerns us here, transacting with them. Coleman put this transactional feature in the wrong place in his original analysis. He insisted that the role of corrective justice is in the undoing of the wrongful (transactional) losses and gains, rather than in the undoing of wrongs (transactions), which often necessitates the undoing of wrongfully (transactionally) created losses or gains. Coleman preserves this insistence in the 'mixed' conception of corrective justice, declining to adopt the 'undoing of wrongs' feature from the 'relational' conception. But abandoning the 'undoing of losses' analysis in favour of the 'undoing of wrongs' analysis is the main thing that is needed, I think, to capture the vaguely personal flavour of corrective justice that Coleman was trying to capture with his unsuccessful excursion into agent-relativity. That is because a wrong, unlike a loss, is a transaction.

Be that as it may, is Coleman right to emphasise wrongs over other kinds of transactions in carving out the space of corrective justice? Here we find a quite different error in the annulment conception, also carried through to the mixed conception. In this dimension the annulment conception is too narrow rather than too broad. True, the law of torts and the law of breach of contract concern themselves with reversing transactions in which one party breaches her duty towards the other (i.e. wrongs her, infringes her rights). The law of unjust enrichment, on the other hand, concerns itself with reversing certain kinds of non-

wrongful transactions on the ground that their *non-reversal* would be wrongful. Coleman, whether in his pre-1990 or post-1992 guise, would not regard the latter class of reversals as corrective ones. His post-1992 rationale is clearer than his pre-1990 rationale. In *Risks and Wrongs* he takes the view that without the wrongfulness requirement he cannot capture what is agent-relative, or more loosely personal, about corrective justice. He needs there to be a wrongdoer so that there is somebody to pick out for the role of corrector, somebody who is the agent with the special agent-relative reasons. If we are just talking about the reversal of mistaken, incomplete, and frustrated transactions, don't we end up back at ordinary distributional rules, vanilla distributive justice? To make the justice corrective we need someone special who is 'responsible to return your possessions or to make good your losses *independent of considerations of distributive justice*'[32] and so (thinks Coleman) we need a wrongdoer.

Coleman is surely right that doing corrective justice can't merely be the business of re-doing some earlier distributive justice, if it is to be distinctive in a way that makes it worth distinguishing. We are now much better-equipped to show that doing corrective justice passes this test, but not in the way that Coleman anticipates. Let's begin, closest to Coleman's heart, with the case in which what is corrected is indeed a wrong. Sometimes the wrong to be corrected under the heading of corrective justice is itself an injustice. But not always. There are also wrongs of inhumanity, carelessness, dishonesty, untrustworthiness, disloyalty, mean-spiritedness, and so forth, and these may equally call for correction. What made *Blind or be Blinded* and *Two Children and a Cake* so troublesome was that the wrongs there, the ones that called for correction, were distributive injustices. This made it hard to distinguish the business of doing corrective justice from the business of re-doing

[32] *R&W*, 313.

distributive justice. But when we shift our focus to the case of, say, an everyday road accident, the task is nowhere near so hard. What is wrong with a driver running over a pedestrian as he speeds round a corner is not normally that the driver is misallocating his driving efforts or his powers of concentration or anything else. Typically he is simply not concentrating enough full stop, or not making enough driving effort full stop, or something like that. He is a danger to himself as much as to others. That being so, there is no injustice, to speak of, in his running over the pedestrian. The wrong against the pedestrian is better thought of as one of incaution, irresponsibility, or inattentiveness. In which case, the first injustice that occurs is the one that occurs after the collision when the driver fails to do anything to put right his wrong. That is a corrective injustice, ripe for tort law's attention.

So now we have a requirement on the driver 'to make good [the pedestrian's] losses *independent of considerations of distributive justice*'. All that it takes to meet this 'independence condition' is that the objection to the original transaction, the speeding round the corner and hitting the pedestrian, not be an objection from distributive justice. Justice is not the whole of interpesonal morality, even as it concerns the law. So there is plenty of room for objections to transactions that are not objections from justice of any kind. Since they are not objections from justice of any kind, they are not objections from distributive justice. And it follows that even when the wrong *is* a distributive injustice, the independence condition is still met. Even then, the fact of its being a distributive injustice is not what brings corrective justice into play. What brings corrective justice into play is the fact that a wrong was committed, never mind that it was an injustice.

Think back, for example, to norm 4 in *Two Children and a Cake*. While it may be that one child's grabbing his preferred slice of cake yesterday was a distributive injustice, that is not necessary to bring the corrective norm into play. The wrongful transaction could alternatively be regarded as wrongful under the

heading of mean-spiritedness, pettiness, greed, dishonesty, or impoliteness. Different parents, with different priorities in moral education, might emphasise different headings of immorality. But the remedy required by norm 3 would not cease to be one of corrective justice merely because the wrong being corrected was not put under the heading of distributive injustice. That is enough to establish that the independence condition is met.

If the independence condition can be met in this way with wrongful transactions, why not equally with transactions that are merely mistaken, invalid, or in other ways unfortunate? Indeed why not *a fortiori*? Not all wrongs are injustices, but all injustices, including distributive injustices, are wrongs. It follows that where the transaction that is undone is not a wrongful one, the norm under which it was done *cannot but* meet the independence condition. Not being wrongful, the thing being undone cannot quality as a distributive injustice, and so the undoing cannot be cast as the mere redoing of distributive justice. This suggests that we need to interpret the legal label 'unjust enrichment' with some care. Inasmuch as the transaction corrected by the law of unjust enrichment is not a wrong, that transaction also cannot be the injustice to which the label refers. The injustice to which the label refers must be that of failing to undo the enrichment once it has occurred, which is a corrective injustice. 'Unjust enrichment' means 'enrichment that it would now be unjust not to undo', not 'enrichment that was unjustly created in the first place'.

It was a weakness in Coleman's annulment conception that such injustice was not classified as corrective injustice. Coleman had the opportunity to put this right in *Risks and Wrongs* but failed to seize it. More generally his reexamination of the annulment conception did not lead him in fruitful directions. He abandoned some of its most appealing aspects, notably its agent-neutrality and its interest in gains and losses alike. Meanwhile he retained the two main features of the conception that he should have dropped. One was its focus, in cases in which loss is created, on undoing the loss, rather than on undoing the transaction that

created the loss. The other was its focus, to the extent that it did attend to transactions, only on wrongful transactions rather than on regrettable ones more generally. By these various moves Coleman ultimately made it harder, not easier, for his new 'mixed' conception to satisfy the independence condition: to 'account for the distinction between distributive and corrective justice' by showing how the corrective impetus operates 'independent[ly] of considerations of distributive justice' (where this means independently of the rest of justice).